**KEE CHAI HEANG**

**v.**

**HO LEUNG UNG & ANOR**

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL SUIT NO. 45 OF 1973]
8 SEPTEMBER 1982

***CONTRACT:*** *Specific performance - Whether defendants proper parties to suit - Effect of sub-sale executed by defendants.*

***EVIDENCE:*** *Contract by deed - Whether oral evidence admissible.*

The plaintiff brought an action for specific performance of a sale indenture executed by the defendants. The defendants however contended that they had sold the land, the subject-matter of the action, to another person. Teh, and that Teh had sold the land to the plaintiff, the defendants signing the indenture as Teh had still not obtained title to the land. They were trustees and under obligation to convey the land to nominees of Teh. They also contended that oral evidence was admissible to explain the circumstances leading to the execution of the indenture by them.

**Held:**

**[1]** The plaintiff had in fact bought the land directly from Teh [*Lysaght v. Edwards* [1875-76] 2 Ch. D 499]

**[2]** The defendants could adduce oral evidence under s. 92 Evidence Act, 1950 (Revised - 1971) to show that they were merely acting as trustees for Teh and had no rights in the said land to pass to the plaintiffs, that in fact there was no contract at all between them and the plaintiff.

*[Action dismissed.]*

**Cases referred to:**
*Lysaght v. Edwards [1875-76] 2 Ch D 499*
*Earl of Egmont v. Smith [1877] 6 ChD 469*
*Bowes v. Foster [1858] 2H & N 779*
*Rogers v. Hadley [1863] 2 H & C 227*
*Pym. v. Campbell [1856] 6 E & B 370*

**Legislation referred to:**
Evidence Act 1950, s. 92

**Other sources referred to:**
*Halsbury's Laws of England*, 3rd Edn., Vol 34, paras. 484, 505 & 589, Vol. 11, pp. 323, 399 paras. 648, 400, 650

**JUDGMENT**

**Gunn Chit Tuan J:**

According to the above named plaintiff, this was a suit for "specific performance of a conveyance dated 18 January 1957" which was filed by him on 1 March 1973. The request to transfer the case to the fixing list of cases for a date of hearing to be fixed was not however

made until 10 October 1977 and it came up for hearing before me this year. The plaintiff (PW1) alleged that he had by an indenture dated 18 January 1957 (pp. 1-5 of the agreed bundle of documents marked "A") bought from the defendants a property described in it as

> "all that portion of that piece of land and hereditaments situate in the Southern District of Province Wellesley being part of the land comprised in Statutory Grant No. 18892 which said portion of the piece of land forms part of Lot 319 Mukim 11 estimated to contain an area of (to be surveyed and sub-divided) which with abuttals and boundaries is delineated and edged round with "red" in a plan annexed hereto and bearing plot No. 14" (hereinafter referred to as the "said land").

According to him the said land was next to Malay kampong land and is now known as Lots 2062 and 2064 as shown on a survey plan drawn in 1971 (p. 12 of the agreed bundle of documents marked "A"). The Malay kampong land is now knows as Lot 2063 as shown on the said survey plan. Under cross-examination the plaintiff admitted knowing a woman called Teh Lan Cheng (hereinafter referred to as "Teh") but denied that he had bought the said land from her and alleged that the purchase money was paid to the first defendant in a lawyer's office. He also admitted that the said indenture did not specify the exact area of the said land but added that he wanted to buy seven acres although the defendants could only sell him about six acres. When he was cross-examined further as to the size of the property he had bought he stated that negotiations to purchase the property were carried out by his wife who was in Court but was not called to give evidence to assist the Court regarding the actual size of the land purchased or the person or persons with whom she had negotiated for the purchase of the said land.

The plaintiff also called a surveyor's assistant (PW2) who was requested by him to survey Lots 2062, 2063 and 2064 in 1972 and the latter drew the plan shown on p. 14 of the agreed bundle of documents. Under cross-examination that witness agreed that when a piece of land was sold to many people in smaller parcels each one of them would not know the actual acreage he or she would get until after survey and sub-division.

Another witness (PW3) called by the plaintiff was his neighbour who admitted under cross-examination that her property, which was also a sub-divided lot next to the plaintiff's lots, was sold by the defendants to Teh and that her property was purchased from the said Teh.

The first defendant Ho (DW1) on the other hand, told the Court that some time in 1956 he and two others had bought some pieces of lands in Province Wellesley which were part of a rubber estate. One of those pieces of land was Lot 319 Mukim 11. A part of the said Lot 319 was sold by them to Teh as evidenced by an agreement dated 23 April 1956 (pp. 22 to 30 of the agreed bundle of documents "A"). Teh paid them a deposit of RM6,000 but they did not sign any transfer to Teh as the lands they had purchased had not yet been surveyed or sub-divided. On 18 January 1957 Ho signed the said indenture in the office of the late Mr. Ong Hock Lim, advocate and solicitor, conveying the said land to the plaintiff. The sum of RM2,010 referred to in the indenture was not received by him and he had to sign the said indenture because Teh had still not obtained title to the said land and could not therefore execute a transfer to the plaintiff. On that date the relevant title was still in their names. Under cross-examination the defendant agreed that the indenture was subsequent to the said agreement dated 23 April 1956. He also stated that he did not sign any other indenture because he discovered that Teh had sold to others more than what they had sold to her.

Teh who was originally subpoenaed by the defendants to appear in Court failed to turn up the first day and a warrant of arrest was issued. She turned up in Court the next day and confirmed that the said agreement dated 23 April 1956 was entered into with the defendants

whereby she purchased 84.44 acres of land from them. Subsequently she sold that property to 14 other people one of whom was the plaintiff. The plaintiff's portion was sold to him on the same day but as she had no title the said land was subsequently conveyed directly from the defendants to the plaintiff in a lawyer's office. Under cross-examination this witness said that she could not remember what kind of document was executed in the lawyer's office nor could she say whether there were any other documents. She explained that the acreage sold to the plaintiff was only estimated and subject to adjustment. The lawyer had told her that if the acreage sold was more the buyer would compensate her but if the acreage sold was less, then she would have to compensate the buyer. She also confirmed that the sum of RM6,000 which was paid to her by her sub-purchasers was handed over by her to Mr. Ong Huck Lim. When challenged she denied that she was the agent or broker for the transaction. She said she had intended to purchase the property for profit but later on when she could not go through with it alone, she brought all the 14 people to the lawyer's office to complete the purchase. She wanted to save transfer fees and income tax and denied that she was a broker but stated that she had bought the property for resale. She explained further that she had in fact incurred a loss in that transaction and had lost her expenses.

On the evidence adduced before the Court I found that the plaintiff had in fact bought the said land directly from Teh who had on 23 April 1956 bought part of Lot 319 Mukim 11, which included the said land sold to the plaintiff, from the defendants. Because the property had to be surveyed and sub-divided, Teh was not able to execute a conveyance directly to the plaintiff and the defendants therefore had to sign the said indenture dated 18 January 1957.

Mr. R.J. Maneksha, Counsel for the defendants, stated that three parties were involved in this case and submitted that after the defendants had sold part of Lot 319 Mukim 11 to Tan, their rights were limited to those of trustees. He submitted that the said indenture did not change the position as the defendants were under an obligation to convey to nominees of Tan who could not execute any transfer because she did not have title to the said Lot. Counsel then referred to the following paragraphs in Vol. 34 of Halsbury's *Laws of England* (3rd Edn.) concerning the sale of land:

> 484. **Effect of agreement for sale**. An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract, his beneficial interest is transferred from the land to the purchase money, and, if his interest was of the nature of real estate, it is, as from that date, converted into personalty. As regards the land, he becomes, as between himself and the purchaser, constructively a trustee for the purchaser, with the right as trustee to be indemnified by the purchaser against the liabilities of the trust property; and the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage, or otherwise ...
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> 505. **Disposition by purchaser.** Upon the making of an enforceable contract for sale the purchaser becomes the owner of the land in equity and can dispose of his equitable interest to a third party, and
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> 589. **Sub-purchaser**. When the purchaser has disposed of the land before the completion of the contract, it is usual, for the purpose of saving the expenses of the second conveyance and double stamp duty, to take the assurance direct to the second purchaser. The disposition may be either by assignment of the contract or resale of the land. Upon an assignment of the contract the original purchaser is not usually a necessary party to the conveyance, nor is he a necessary party where there is a resale without increase of price.

Counsel also referred to the following passage in the judgement of Jessel, MR in *Lysaght v. Edwards* (1875-76) 2 Ch.D 499 @ p. 506:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Courts as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, ...

Counsel therefore contended that when the defendants signed the indenture on 18 January 1957 they had no rights in the said land to pass to the plaintiff but were merely doing so as trustees for Tan. He also pointed out that the plaintiff should have sued Tan for having sold him more than what was later on conveyed. Finally Counsel referred to the following passage in another judgment of Jessel M.R. in *Earl of Egmont v. Smith* (1877) 6 Ch.D 469 @ 474 on the right of a purchaser to separate conveyances in lots:

> I take it that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase-money. Whether he could or could not object to convey it at various times is another matter, but that he could not object to convey on his being paid the additional expense occasioned by his joining in several conveyances instead of one, I am quite clear.
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> An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct.

I would, with respect, adopt the above dictum which shows that there was nothing improper on the part of the defendants in agreeing to convey the property sold to Teh, as requested by her, in smaller parcels to her 14 different sub-purchasers.

When Mr. Eugene Khoo, Counsel for the plaintiff addressed the Court, he pointed out that the conveyance in this case was by way of a deed. He then referred to the following paragraph in Vol. 11 of *Halsbury's Laws of England* (3rd Edn.) at p. 323:

> **Effect: rule against derogation.** The effect of executing a deed is that the party, whose act and deed it is, is conclusively bound by the intention or consent expressed therein, provided that it has been delivered unconditionally and not as an escrow; he is, in general, so bound even though another party has not executed the deed; he is, as a rule, estopped from averring and proving by extrinsic evidence that the intention or consent so expressed was not in truth his intention or consent, or that there are reasons why he should not be obliged to give effect to the intention or consent so expressed or that a deed, fraudulently made on his behalf by his agent, is not his, if his delay in bringing the fraud to the notice of the other party to the deed has resulted in detriment to the other party. This is equally the case whether the deed is expressed to operate as a conveyance of property or as a contract or otherwise.
>
> It is a well-established rule that a grantor cannot be permitted to derogate from his grant.

Counsel also pointed out that there was no preamble in the said indenture regarding a sub-sale and then referred to another paragraph on evidence of previous negotiations at p. 399 of Vol. 11 *Halsbury's Laws of England* (3rd edn.):

> **648. Evidence of previous negotiations.** ...When a written agreement is carried into effect by a conveyance, the conveyance becomes the final evidence of the intention of the parties, and is not liable to be varied by reference to the agreement; nor is the construction of a written instrument varied by the subsequent declaration or conduct of the parties. The instrument is to be construed as at the time of its execution.

The essence of Mr. Eugene Khoo's arguments was that as the defendants had executed a deed of conveyance it became final evidence of the intention of the parties thereto and that there cannot be any evidence of previous negotiations, if any, between them. With respect to Counsel's submission, although it is a familiar rule of law that no parol evidence is admissible to add to, contradict, vary or alter the terms of a deed or any written instrument, yet it is a rule which is not enforced in certain proceedings, as for example, when the Court is asked to grant a discretionary remedy such as rectification, rescission or specific performance. In proceedings for specific performance, as in this case, the defendant is allowed to give parol evidence under s. 92 of the Evidence Act 1950 (Revised 1971) to show that the written instrument did not represent the real contract between the parties or that there was no agreement between the parties and therefore no contract. (See also para. 650 at p. 400 of Vol. 11 of *Halsbury's Laws of England* (3rd Edn)). In other words extrinsic evidence is admissible to show that what appears to be a valid and binding contract is in fact no contract at all. Thus it may be shown that the writing was not in fact intended by the parties to give rise to contractual obligations (cf *Bowes v. Foster* [1858] 2 H & N 779; *Rogers v. Hadley* [1863] 2 H & C 227). The law that evidence may be admitted to show that there is not an agreement at all was thus laid down by Erle J in *Pym. v. Campbell* [1856] 6 E & B 370, 373:

> The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *'animo contrahendi'*, the terms contained in it are conclusive, and cannot be varied by parol evidence ... The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

In the same case Crompton J said:

> I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done...The parties may not vary a written agreement: but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible.

In the present case, apart from the fact that no objection was taken at the trial by Counsel for the plaintiff to the admission of oral evidence by the first defendant regarding the circumstances in which the said indenture was signed by the defendants on 18 January 1957, I also agreed with the contention of the learned Counsel for the defendants that the said indenture did not change the legal position of the defendants who were also in the circumstances as shown by the evidence adduced merely trustees of Teh to whom they had sold part of Lot 319 Mukim 11 which included the said land bought by the plaintiff. The plaintiff had therefore sued the wrong persons and in the circumstances the Court could not possibly order specific performance against or even for the payment of damages by the defendants. For the above reasons, the plaintiff's suit was therefore dismissed with costs.

Also found at [1983] 1 CLJ 202